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No. 81-2235

In the Supreme Court of the United States

OCTOBER TERM, 1982

EMILIO GARCIA, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fifth Amendment confers a substantive right to participate in the federal Witness Protection Program.

2. Whether the Due Process Clause requires notice and an opportunity for a hearing when the government decides to discontinue the protection provided by the Witness Protection Program.

3. Whether petitioner's Firs. Amendment rights or right to privacy were violated when the government discontinued his participation in the Witness Protection Program after he voluntarily revealed his true identity and whereabouts in the press.

4. Whether a private cause of action for damages may be inferred from the statute pursuant to which the Witness Protection Program was created.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a-1 to a-26) is reported at 666 F. 2d 960. The opinion and order of the district court dismissing count IV (Pet. App. a-27 to a-28) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1982. The petition for a writ of certiorari was filed, after an extension, on June 4, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 501-504 of Title V of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 933, 18 U.S.C. prec. 3481, pursuant to which the Witness Protection Program was created, are reproduced in petitioner's appendix (Pet. App. a-88 to a-90).

STATEMENT

1. Title V of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, Section 501, 84 Stat. 933, 18 U.S.C. prec. 3481, authorizes the Attorney General "to provide for the security of Government witnesses, potential Government witnesses, and the families of Government witnesses and potential witnesses in legal proceedings against any person alleged to have participated in an organized criminal activity." The Attorney General may provide protected housing facilities and other protective services "whenever, in his judgment, testimony from, or a willingness to testify by, such a witness would place his life or person, or the life of a member of his family or household, in jeopardy." Any person who accepts an offer to use such facilities "may continue to use [them] for as long as the Attorney General determines the jeopardy to his life or person continues."

Pursuant to this statutory authorization, the federal Witness Protection Program (hereinafter "the Program") was created. Participants in the Program are protected by the United States Marshals Service. See 28 C.F.R. 0.111(c). The Marshals Service may assign personnel to guard a participant or may give the witness a new identity and relocate him in another part of the country (Pet. App. a-8). See also *Doe* v. *Civiletti*, 635 F. 2d 88, 90 (2d Cir. 1980).

2. In the 1970's, petitioner infiltrated various drug smuggling operations on behalf of the Drug Enforcement Administration (DEA) and its predecessor agency (Pet. App. a-64). He reported the information he collected to federal authorities and served as a government witness in prosecutions of drug smugglers (*id.* at a-64, a-67). Because of these activities, petitioner was offered and accepted the protection of the Witness Protection Program (*id.* at a-64 to a-65). Petitioner and the Marshals Service then entered into an oral agreement setting forth the conditions of petitioner's participation. The Marshals Service agreed, among

other things, to relocate petitioner in another city and to supply him with a new identity (*id.* at a-66). However, continued protection was conditioned upon petitioner's " 'staying away from criminals, people that knew him and staying out of trouble' " (*id.* at a-8). In May 1975, after nearly 16 months' participation in the Program, petitioner approached the Miami Herald, a newspaper in the city in which he resided, and gave an interview concerning the Program (*id.* at a-3 to a-4; R. 313, 690-707).[1] Petitioner's real name and his photograph appeared in the newspaper together with the initial article discussing his participation in the Program (R. 690-692), and a series of articles followed (R. 693-707). Soon after the appearance of these articles, the Marshals Service terminated petitioner's participation in the Program.

3. Petitioner then brought suit in the United States District Court for the Southern District of Florida seeking reinstatement, damages, and other relief. In Count IV of his complaint, in which four employees of the Marshals Service were named as defendants in their individual capacities,[2] petitioner sought $300,000 in damages for alleged violations of his constitutional rights. He contended that discontinuation of his participation in the Program violated substantive and procedural rights protected by the Due Process Clause of the Fifth Amendment, as well as his constitutional right to privacy, his First Amendment right to free speech, and the Eighth Amendment prohibition against cruel and unusual punishment (Pet. App. a-72 to a-75).

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[1]"R." refers to the record in the court of appeals.

[2]Petitioner asserts (Pet. 2-3 n.2) that his complaint included a claim for damages against former Attorney General Griffin Bell and William E. Hall, the Director of the Marshals Service. However, paragraphs 5, 7, and 56 of the complaint (Pet. App. a-33, a-63) show that those individuals were not named as defendants in count IV. Thus, the only individual respondents are Donald D. Forsht, Frank W. Noe, John W. Cameron, and Raymond Pope.

After extensive discovery, the district court dismissed count IV (Pet. App. a-27 to a-28).[3] The court of appeals affirmed (*id.* at a-1 to a-26), concluding that count IV did not state a claim for relief under any of the constitutional provisions upon which petitioner had relied. The court held that the Due Process Clause did not confer a right to participate in the Program and therefore that discontinuation of petitioner's participation did not violate substantive due process (*id.* at a-10 to a-11). The court also rejected petitioner's procedural due process claim, since participants in the Program lack a property or liberty interest in continued participation (*id.* at a-11 to a-15), and rejected petitioner's right to privacy claim (*id.* at a-19 to a-20), noting that removal from the Program did not constitute a governmental restriction upon his privacy and that continued participation in the Program "is not a constitutional or fundamental right entitled to privacy protection" (*id.* at a-20).

The court of appeals also found no merit in petitioner's First Amendment claim (see Pet. App. a-15 to a-18). The court noted that petitioner had "materially and substantially interfered with the purpose and efficiency" of the Program by revealing his identity and location and that petitioner "could have criticized the Program without identifying himself and his location publicly" (*id.* at a-18). The court therefore held that the government's interest in preserving the anonymity of participants in the Program outweighed petitioner's interest in revealing his identity (*id.* at a-17).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any court of

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[3]The rest of the case was subsequently dismissed or settled (R. 1508-1509).

appeals. Accordingly, further review by this Court is not warranted.

1. Petitioner contends (Pet. 17-27) that the termination of his participation in the Witness Protection Program violated substantive rights protected by the Due Process Clause, including the right to privacy (Pet. 44-48). Under the Due Process Clause, petitioner claims (Pet. 17-24), those who testify against organized crime figures have an unconditional right to the special federal protection provided by the Witness Protection Program. Petitioner also maintains (Pet. 25) that even if participation in the Program was not constitutionally mandated, the Due Process Clause limited the circumstances under which that participation could be terminated without his consent. Petitioner's arguments are frivolous.

As the court of appeals noted, the "Constitution does not require the establishment of the Witness Protection Program" (Pet. App. a-10). The Program furnishes special, costly protection beyond that received by most citizens or government witnesses, and no individual has a constitutional right to such protection. Cf. *Turner* v. *United States*, 248 U.S. 354, 357-358 (1919) (the government has no substantive duty to protect its citizens from criminal activity). The framers of the Bill of Rights would have been surprised indeed to learn that the Fifth Amendment guaranteed the extraordinary protection provided by the Witness Protection Program. Title V of the Organized Crime Control Act of 1970 was not enacted to vindicate a constitutional right that had been violated for nearly two centuries but to permit the Attorney General, in the sound exercise of his discretion, to confer a special benefit upon certain individuals. See *Doe* v. *Civiletti, supra*, 635 F. 2d at 89; H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 48 (1970).

Nor does the Due Process Clause confer a substantive right to remain in the program once accepted. Citing *Richardson* v. *Belcher*, 404 U.S. 78 (1971), petitioner claims (Pet. 25-27) that termination of his participation in the Program constituted arbitrary government action. *Richardson* v. *Belcher, supra*, held that a statutory classification in the Social Security Act did not violate due process because it was "rationally based and free from invidious discrimination" (404 U.S. at 81, quoting *Dandridge* v. *Williams*, 397 U.S. 471, 487 (1970)). The decision to discontinue petitioner's participation in the Program after he voluntarily disclosed his true identity and whereabouts in the press clearly met that test.

Petitioner's argument is not bolstered by the assertion (Pet. 47) that his "initial participation in the Program and his subsequent termination, greatly affected matters relating to his marriage, procreation, family relationships, child rearing and education." Any effect upon these matters is incidental and results, not from government restrictions, but from petitioner's decision to expose himself to risk by disclosing his identity and whereabouts. In essence, petitioner argues that the government must undergo the expense of relocating him and providing him with another new identity. And, if he later chose to reveal his identity and whereabouts once again, presumably a third relocation and a third new identity would be constitutionally mandated. Due process does not require such an expenditure of public funds. In a case in which true privacy interests were implicated, this Court observed (*Harris* v. *McRae*, 448 U.S. 297, 317-318 (1980)): "Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise

would mark a drastic change in our understanding of the Constitution." Here, the Due Process Clause does not confer an entitlement to such funds as may be necessary to provide petitioner with special protection despite his own counterproductive behavior.

2. Petitioner contends (Pet. 27-28) that termination of his participation in the Program without notice and an opportunity for a hearing violated procedural due process. He asserts (Pet. 30-35) that participation in the Program constitutes a "property" interest conferred by statute and (Pet. 35-38) that the discontinuation of his participation deprived him of "liberty" as well. The court of appeals correctly rejected these arguments, finding that petitioner had no constitutionally protected "property" or "liberty" interest in continued participation in the Program (Pet. App. a-11 to a-15).

a. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a[n] unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). The statute pursuant to which the Witness Protection Program was devised did not create a property interest in the continued receipt of benefits. *Doe* v. *Civiletti, supra*, 635 F. 2d at 97 n.21. Instead, it merely authorized the Attorney General, in his discretion, to extend special protection in certain cases. Neither the statute nor its legislative history suggests that Congress intended to confer an entitlement to continued participation in the Program. Rather, Congress intended to grant the Attorney General "broad authority" to determine which witnesses should be offered special protection, the nature of the protection, and "the length of time the facilities should be available." H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 48 (1970). Congress did not intend to leave such decisions to the witnesses because, as Will R.

Wilson, the former Assistant Attorney General in charge of Criminal Division, testified, "Some of the witnesses tend to be imaginative about the danger to them and I would seriously question giving a witness an absolute right to protective facilities in view of the terrible expense involved." *Organized Crime Control: Hearings Before Subcomm. No. 5 of the House Comm. on Judiciary*, 91st Cong., 2d Sess. 182 (1970) (hereinafter "*Hearings*").[4]

Petitioner relies (Pet. 31-35) upon the following provision of Section 502 (84 Stat. 933) to support his contention that the Program creates a property entitlement:

> Any person availing himself of an offer by the Attorney General to use such facilities may continue to use such facilities for as long as the Attorney General determines the jeopardy to his life or person continues.

As the court of appeals noted (Pet. App. a-13), this language was not intended to limit the broad discretion of the Attorney General to decide "the length of time the facilities should be available." See H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 48 (1970). Instead, it was designed to make clear that protection could be provided after the conclusion of the trial at which the witness testified and "for as long as the Attorney General determines the jeopardy to his life or person continues." See S. Rep. No. 91-617, 91st Cong., 1st Sess. 60 (1970); 116 Cong. Rec. 35292-35293 (1970). Petitioner's construction of this provision (see Pet. 31-35)—that

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[4]Petitioner's reliance upon *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (Pet. 30-31) is misplaced. There, any individual who met the statutory qualifications for receipt of welfare benefits was entitled to receive them (397 U.S. at 261-262). By contrast, participation in the Witness Protection Program depends upon an exercise of the Attorney General's broad discretion, and no one has an entitlement to a favorable exercise of that discretion. See *Bishop* v. *Wood*, 426 U.S. 341, 344-347 (1976) (where policeman served at will and pleasure of the city he had no entitlement to continued employment).

the government may never withdraw protection without the witness's consent as long as his life remains in danger—would render the meaning of the statute absurd. Under that interpretation, the government would be obligated to bear whatever expense was required to protect a person who refused to comply with any of the measures designed for his protection.

b. Petitioner also contends (Pet. 36-38) that the termination of his participation in the Witness Protection Program deprived him of a liberty interest protected by the Fifth Amendment. However, the court of appeals properly rejected that claim as well (Pet. App. a-14 to a-15). Accord, *Doe* v. *Civiletti*, *supra*, 635 F. 2d at 97 n.21. As previously noted, participation in the Program is not a constitutional right, and when such protection is discontinued in a manner that has no impact upon the former participant's reputation, he is placed in the same position as any other person. Thus, the termination of a witness's participation in the Program does not deprive him of a constitutionally protected liberty interest.

3. Petitioner next argues (Pet. 38-44) that he was unconstitutionally discharged from the Program "in retaliation for exercising his First Amendment rights" (Pet. 38). This contention is also without merit.

In rejecting petitioner's argument, the court of appeals aptly referred (Pet. App. a-16 to a-18) to cases concerning restrictions upon speech by public employees (*Pickering* v. *Board of Education*, 391 U.S. 563 (1968)) and public school students (*Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969)). With respect to public employees, this Court has noted (*Pickering* v. *Board of Education*, *supra*, 391 U.S. at 568):

> [I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that

> differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

See also *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410, 414 (1979); *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 284 (1977).

Here, as the court of appeals held (Pet. App. a-18), the government's interest in concealing petitioner's true identity and whereabouts far outweighed petitioner's interest in revealing those facts in connection with the interviews he gave to the press. The record before the court of appeals showed that petitioner approached a newspaper in the Miami area, where he had been relocated, and voluntarily revealed his true identity. His picture and real name subsequently appeared in the paper (Pet. App. a-18; R. 313, 690-692). As the court of appeals noted, petitioner's conduct substantially and materially undermined the efficient operation of the Program and made it much more difficult and expensive to protect him. While public comment concerning problems with the Program is important public debate, petitioner could have readily made such comment without destroying the anonymity essential to the Program's success.[5]

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[5]Petitioner contends (Pet. 17-20 & n. 18, 26 & n. 20, 43-45 & n. 23) that the court of appeals erred in looking beyond his complaint and taking into consideration petitioner's answers to interrogatories and the articles in the Miami Herald, which were part of the record in the district court (R. 690-707) and to which petitioner referred in his complaint (Pet. App. a-73). However, an appellate court may affirm a lower court decision on an alternative ground that appears in the record (see

Petitioner maintains (Pet. 41) that his relationship to the government was not analogous to that of a public employee but was "one of citizen in general to the government." However, the government placed no restrictions whatsoever on petitioner's speech as an ordinary citizen. The government merely decided that it would not bear the expense of providing special protection to petitioner after he voluntarily chose to place himself in danger by disclosing his identity and location.

4. Petitioner contends (Pet. 49-50) finally, that a private cause of action for damages against the individual defendants may be inferred from the statute pursuant to which the Witness Protection Program was created. Count IV of petitioner's complaint, the dismissal of which is all that he appealed, does not contain such an allegation, and that claim was not otherwise raised in the district court or the court of appeals. Accordingly, petitioner's argument should not be considered by this Court. Cf. *Youakim* v. *Miller*, 425 U.S. 231, 233-234 (1976).

In any event, petitioner's claim has no merit. "[T]he question whether a statute creates a private right of action is ultimately 'one of congressional intent * * *' " (*Universities Research Association* v. *Coutu*, 450 U.S. 754, 770 (1981), quoting *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979)), and there is nothing in "the 'language and focus of the statute, its legislative history, [or] its purpose' " (*Universities Research Association, supra*, 450 U.S. at 770; quoting *Touche Ross & Co.* v. *Redington, supra*, 442 U.S. at 575-576; *Cort* v. *Ash*, 422 U.S. 66, 78 (1975)) to suggest

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Schweiker v. *Hogan*, No. 81-213 (June 21, 1982), slip op. 15 n.24), and petitioner's answers to interrogatories and the newspaper articles could properly be considered in ruling upon a motion to dismiss petitioner's complaint (see Fed. R. Civ. P. 12(b), 56(c)).

that Congress intended to create a private cause of action. To the contrary, the statutory language (see Pub. L. No. 91-452, Title V, Section 502, 84 Stat. 933), the legislative history (see, *e.g.*, *Hearings, supra*, at 181-182), and the legislative purpose show that Congress merely intended to authorize the Attorney General to provide special protection in certain cases where, in his judgment, such protection would assist in the discharge of his prosecutorial functions.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1982

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[6]Petitioner relies solely upon alleged violations of constitutional and statutory rights. He does not claim breach of contract.

DOJ-1982-08